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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

3 -----x  
4 IN RE TETHER AND BITFINEX  
5 CRYPTO ASSET LITIGATION,

19 Civ. 9236 (KPF)

Decision

6 -----x  
7 New York, N.Y.  
8 October 13, 2022  
9 2:15 p.m.

Before:

HON. KATHERINE POLK FAILLA,

District Judge

12 APPEARANCES

13 ROCHE FREEDMAN LLP

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14 BY: CONSTANTINE PHILIP ECONOMIDES

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15 EDWARD JOHN NORMAND

-and-

16 SCHNEIDER WALLACE COTTRELL KONECKY WOTKYNs LLP

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1 (The Court and all parties present remotely)

2 THE COURT: The case has been called. I'm not going  
3 to ask the parties to identify themselves because I'm aware  
4 that my deputy has already taken appearances.

5 I am now going to be giving an oral decision on the  
6 applications regarding Mr. Roche and the Roche Freedman firm,  
7 and I'm going to ask you all, please, to mute your phones as I  
8 do so, so that there aren't interruptions once I begin. I'll  
9 give you a second or two to mute your phones at this time.

10 Now I will begin.

11 As always, I thank you, those of you who have given me  
12 written and oral submissions on these points, and I do  
13 genuinely and sincerely appreciate your giving me some  
14 opportunities, some time, to consider what was said at the  
15 October 3 oral argument and to reflect on what I think is a  
16 very serious issue. For the reasons that I am about to  
17 outline, I am modifying my order appointing interim class  
18 counsel to remove the Roche Freedman firm from that class  
19 counsel.

20 This decision does not require extensive citation to  
21 cases. Unlike Roche Freedman's framing of the issue as one of  
22 disqualification of a firm, I find that this dispute actually  
23 arises under Federal Rule of Civil Procedure 23(d)(2), which  
24 allows an order under Rule 23(d)(1) to be altered or amended  
25 from time to time and to be combined with an order under

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1 Rule 16.

2 The order in question is my February 27, 2020, order  
3 by way of minute entry appointing lead plaintiff and interim  
4 class counsel, and it is the latter portion that I am being  
5 asked to revisit. I have considered the views of the named  
6 plaintiffs in this case. They are the putative class  
7 representative, but, ultimately, I conclude that their  
8 preferred counsel structure is not in the best interests of the  
9 class, and of course, if that causes any of the plaintiffs, the  
10 named plaintiffs, to wish to exit the case, I will hear from  
11 them when it is appropriate to do so.

12 But before I get to the legal analysis, I do want to  
13 spend a moment on the reasons why I am revisiting my prior  
14 order, and this is not to beat the proverbial dead horse, but  
15 rather just to provide a factual framework for my decision.

16 In January of 2022, nearly two years after my  
17 appointment of an interim class counsel team that included the  
18 Roche Freedman firm and before the production of discovery in  
19 this case, one of the principals at the Roche Freedman, Kyle  
20 Roche, made a series of ill-advised comments suggesting, if not  
21 asserting, his close ties to and financial interest in Ava  
22 Labs, a research and development company that is involved in  
23 developing the Avalanche platform and the AVAX cryptocurrency,  
24 as well as Mr. Roche's strategic deployment of class action  
25 litigation to aid Ava Labs both by focusing regulators on Ava's

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1 competitors and on obtaining confidential information  
2 concerning those competitors through the class action process.

3 Mr. Roche claims that the video recordings of these  
4 statements are highly edited and taken out of context, that he  
5 was set up by a competitor, and that he was inebriated at the  
6 time he made the statements. All of that notwithstanding,  
7 Mr. Roche has moved to withdraw from representing the class  
8 plaintiffs in this case. The Roche Freedman firm has  
9 represented that it will or has walled him off financially from  
10 receiving any fees from this case, and Mr. Roche is not  
11 currently involved with the firm's plaintiff-side crypto-asset  
12 class action practice.

13 Roche Freedman has suggested that this is sufficient  
14 to allow them to remain on as one of the three interim class  
15 counsel. Their cocounsel, as well as defendants' counsel, and  
16 an earlier contender for interim class counsel all disagree.

17 In an early effort to frame this issue, I considered  
18 whether the factual bases for my decision to include Roche  
19 Freedman in the trio of law firms appointed as interim class  
20 counsel has changed. That answer is an easy, indisputable yes.

21 At the February 24, 2020, oral argument, it was  
22 Mr. Roche that I heard from first who began by explaining his  
23 firm's expertise in the crypto-asset space, and in so doing  
24 countering the position offering by the competing Robbins  
25 Geller firm regarding the appropriate definition of the class.

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1 Ms. Halligan then came in to explain the selling  
2 points of each firm and, more to the point, why I should  
3 appoint all three of them. Roche Freedman for their -- her  
4 words, not mine -- unparalleled expertise in cryptocurrency;  
5 Schneider Wallace for their class action experience; and what  
6 was, I believe, then the Selendy & Gay firm, it's now Selendy  
7 Gay & Elsberg, for their experience with complex litigation and  
8 state law claims.

9 Mr. Roche and Ms. Halligan's arguments convinced me to  
10 appoint the three firms as interim class counsel despite my  
11 initial expressed hesitancy to do so.

12 In my oral decision, which I believe was issued  
13 February 27 of 2020, I remarked, and I'm quoting here, that  
14 "what interests me about this case is that it is an interesting  
15 combination of old and new. The cryptocurrency laws is quite  
16 novel and lots of issues and not a lot of resolution, but there  
17 is a lot of established law out there with respect to the  
18 pleading requirements, with respect to traditional antitrust  
19 issues and RICO and the Commodities Exchange Act."

20 I included the Roche Freedman to address the novel  
21 legal issues that were expected to arise. I did so based  
22 largely on the oral advocacy and anticipated involvement of  
23 Mr. Roche, and he is no longer involved in the litigation.

24 But that analysis, while accurate, is also a bit  
25 facile. We are more than two and a half years removed from my

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1 order appointing interim class counsel, and I daresay that we  
2 all know more about crypto-assets, crypto exchanges,  
3 stablecoin, and crypto commodities than we did when this  
4 litigation began. That said, Mr. Freedman, from the Roche  
5 Freedman firm, has forcefully argued that the firm still has a  
6 leg up on their cocounsel when it comes to this particular area  
7 of the law.

8 On the other side of the equation is the additional  
9 litigation that would ensue if the Roche Freedman firm were to  
10 remain in the case. Defense counsel has made it clear that  
11 there will be additional litigation both during the discovery  
12 phase if Roche Freedman continues to have access to materials  
13 produced by the defendants under the protective order, and then  
14 later in connection with the class certification stage.

15 I want to be clear, or I should say that I'm not  
16 optimistic that discovery will be entirely free from disputes  
17 if Roche Freedman is out of the case, particularly given the  
18 disputes I've already resolved. But I do acknowledge that  
19 there will be additional litigation if and because the firm  
20 remains in the case.

21 The question here distills to what counsel structure  
22 is in the best interests of the putative class, and to me that  
23 further distills to whether the incremental benefits of Roche  
24 Freedman remaining as interim class counsel in terms of their  
25 institutional knowledge and their expertise in one of the

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1 substantive areas of the law implicated by the case outweigh  
2 the additional litigation burdens occasioned by their  
3 involvement. Ultimately, I find that the burdens outweigh the  
4 benefits.

5 For starters, we are two years into this litigation.  
6 Everyone has benefited from the on-the-job instruction we've  
7 received on crypto-assets and crypto exchanges. And as a  
8 result, I believe that the Selendy and the Schneider firms are,  
9 or quickly can be, up to speed on that area of the law.  
10 Further, I believe that they already have superior expertise in  
11 other areas of the law implicated by this litigation, including  
12 the Sherman Act, the Commodities Exchange Act, common law  
13 fraud, and issues of class action certification. So in  
14 consequence, I find that the putative class will not suffer any  
15 loss in the quality of their representation if the Roche  
16 Freedman firm is discontinued as interim class counsel.

17 Now, just to amend what I've just said, I said we're  
18 two years into this litigation. I think we're closer to three.  
19 We've been in this litigation for several years. Let me look  
20 at the converse position, though.

21 The parties have been fighting since long before  
22 Mr. Roche's disclosures were made. I am concerned that  
23 establishing another front for the parties' disputes will  
24 derail this litigation. What is more, I cannot be sure at this  
25 time of the size of this new front. So in this regard, I don't



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1 share Mr. Normand's view expressed in oral argument that this  
2 additional litigation would be but a brief distraction and not  
3 disabling. These ancillary disputes will extend this  
4 litigation, they cannot be dismissed summarily, and I don't  
5 think that it's in the best interests of the class if they  
6 persist.

7 Related to this point is my concern that Mr. Roche's  
8 problems will extend to others at his firm or will otherwise  
9 adversely impact the case before me.

10 Now, this is almost certainly a consequence of the  
11 recency of these disclosures, but the fact is we, or anyone,  
12 had not yet gotten to the bottom of the relationship that  
13 Mr. Roche has or had with Ava Labs and, by extension, whether  
14 the litigation strategies suggested in his recorded comments  
15 were implemented by him with respect to Ava Labs or other  
16 clients of the firm or by others at the firm.

17 It is too easy to say that Mr. Roche was drunk and  
18 stupid. His statements were coherent and logical and too  
19 detailed for me to dismiss out of hand. Roche Freedman has  
20 offered a number of arguments seeking to mitigate or  
21 contextualize these statements, but largely they do not  
22 succeed. For example, the firm asserts that their involvement  
23 in the instant litigation, or their decision to bring the  
24 instant litigation, predates the formation of or certainly the  
25 retention by Ava Labs, and that may be. But Mr. Roche's

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1 comments did not suggest that his strategic use of class action  
2 litigation only came into existence after his dealings with Ava  
3 Labs. Similarly, even if I accept Roche Freedman's arguments  
4 that the defendants in this litigation are not competitors of  
5 Ava Labs, I cannot say that Mr. Roche's professed class action  
6 litigation strategy was limited to that one client.

7 Furthermore, given what Mr. Roche did say on the  
8 point, I am not comforted by the fact that he did not  
9 specifically say in the recordings that he shared confidential  
10 materials produced in discovery in this case. And I completely  
11 reject the counterargument that removing the Roche Freedman  
12 firm as interim class counsel would somehow incentivize  
13 misconduct by defense attorneys.

14 Nor am I persuaded after reading and considering  
15 Mr. Roche's declaration that he didn't capitalize on synergies  
16 between this litigation and the interests of other Roche  
17 Freedman clients. To begin, I currently don't accept his  
18 current explanation that he was merely referring to  
19 whistleblowers or insiders, given the comments that were made.

20 More fundamentally, the issues created by -- for  
21 Mr. Roche by these disclosures are evolving. They clearly  
22 extend beyond this case. I have only limited visibility into  
23 these issues, and I will not make findings about what  
24 Mr. Roche did or did not do or meant or did not mean based on a  
25 two-and-a-half page declaration without a more extensive

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1 investigation.

2 Now, to be clear, I acknowledge that there is a  
3 difference between Mr. Roche and the Roche Freedman firm, but  
4 at this point in time, I have concerns about the firm as well.  
5 I acknowledge that similar disclosures haven't been made about  
6 other lawyers at the firm, but it remains the case that one of  
7 the two named partners at the firm, and the very person who  
8 persuaded me to add the Roche Freedman firm to the interim  
9 class counsel team, touted a theory of class action litigation  
10 that I believe amounts to improper purposes.

11 If Mr. Roche's boasts are true -- and, again, I can't  
12 reject them out of hand -- then it would actually surprise me  
13 if such an ethos were limited to Mr. Roche alone. In any  
14 event, the degree to which the Roche Freedman firm has  
15 attempted to minimize Mr. Roche's statements gives me concern  
16 that they don't appreciate the seriousness of those statements,  
17 and I've already explained the dim view with which I hold the  
18 firm's arguments in mitigation.

19 I want now to return to my earlier point, and that is  
20 that allowing the Roche Freedman firm to continue as interim  
21 class counsel with the metaphorical baggage they now carry is  
22 not in the best interests of the class. Put somewhat  
23 differently, I see this as a case of subtraction by addition,  
24 wherein three law firms will have a more difficult time  
25 litigating this case than two law firms because of the

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1      aftershocks of Mr. Roche's comments.

2               And to repeat, I do not believe that the class will  
3      suffer any diminution in their representation if the Selendy  
4      and the Schneider firms remain, and for all of these reasons, I  
5      am amending my prior order to remove Roche Freedman as interim  
6      class counsel.

7               There is one related issue to address, and that is  
8      that the Kirby Radice team of attorneys argued that the best  
9      course of action here was to start with a clean slate, whereby  
10     the Kirby and Radice firms would take over at interim class  
11     counsel and, if and as appropriate, new class plaintiffs could  
12     be substituted in.

13              While I have given this option consideration, serious  
14     consideration, I have ultimately rejected it. We are too many  
15     years into this litigation to switch horses entirely, and I see  
16     nothing to suggest that the Selendy and the Schneider firms  
17     have comparable issues that would impact their ability to  
18     represent the putative class adequately. So the Selendy and  
19     the Schneider firms will remain interim counsel.

20              In short, I am granting Mr. Roche's earlier motion to  
21     withdraw because I don't believe I have done that. I am  
22     modifying my prior order to remove Roche Freedman as one of the  
23     three interim class counsel. To the extent appropriate, I will  
24     direct Roche Freedman to withdraw from any relevant protective  
25     order entered in this case and to return any confidential

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1 materials that are covered by that agreement.

2 That is my decision in this case. I thank you all for  
3 listening to it, and I appreciate your allowing me to give it  
4 as an oral decision rather than a written.

5 I wish you, your families, and your clients continued  
6 safety and good health in this pandemic.

7 We are adjourned. Thank you.

8 (Adjourned)